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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 582

SAMUEL ROTH, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE FOR GREENLEAF PUBLISHING COMPANY AND HMH PUBLISHING CO., INC.

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INDEX

Page

~~Motion of Greenleaf Publishing Company and HMH Publishing Co., Inc., for Leave to File Brief Amicus Curiae ..... 1~~

Brief Amicus Curiae for Greenleaf Publishing Company and HMH Publishing Co., Inc. 5

Introductory Statement 5

I. Section 1461 is Unconstitutionally Vague 11

A. *Judicial Interpretation of the Term "Obscene" Has Supplied No Workable Standard for Administration of Section 1461* 11

B. *The Ambiguity of Section 1461 is Underscored By the Absence of Any Evidence That Writings or Pictures Have Any Harmful Effects* 16

C. *The Resort to Literary Criteria Generates Even Greater Confusion* 18

D. *The Evil Consequences of a Vague Statute Are Greater in the Area Protected by the First Amendment* 21

II. Section 1461 is Invalid Under the First Amendment 22

Conclusion 27

CITATIONS

Cases:

Abrams v. United States, 250 U.S. 616, 630 24

Attorney General v. Book Named God's Little Acre, 326 Mass. 281, 93 N.E. 2d 819 (1950) 12

Bartell v. United States, 227 U.S. 427 11

Beauharnais v. Illinois, 343 U.S. 250, 266 11

Besig v. United States, 208 F. 2d 142, 145, 146 ..13, 15, 20

Butler v. Michigan, — U.S. — 8

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 11

Commonwealth v. Gordon, 66 Pa. D. & C. 101 (1949) 12, 30

	Page
Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E. 2d 840 (1945)	12
Doubleday & Co. v. New York, 297 N.Y. 687, 77 N.E. 2d 6, Affirmed without opinion, 335 U.S. 848	12
Dunlop v. United States, 165 U.S. 486	11
Dysart v. United States, 272 U.S. 655	11
Ex Parte Jackson, 96 U.S. 727	11
Greenleaf Publishing Company v. Summerfield, C.A. No. 3481-56	6
Grimm v. United States, 156 U.S. 604	11
Herndon v. Lowry, 301 U.S. 242, 264	21
HMH Publishing Co., Inc. v. Summerfield, C.A. No. 5041-55	6
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505-506	11, 12
Near v. Minnesota, 283 U.S. 697, 716	11
One, Inc. v. Olesen, 25 LW 2315	24
Parmelee v. United States, 113 F. 2d 729, 731-732	15
People v. Friede, 133 Misc. 611, 233 N.Y.S. 565	24
People v. Viking Press, Inc., 147 Misc. 813, 264 NYS 534 (City Mag. Ct., 1933)	12
Price v. United States, 165 U.S. 311	11
Prince v. Massachusetts, 321 U.S. 158, 168-169	8
Queen v. Hicklin, L.R. 3 Q.B. 360 (1868)	24
R. v. Martin Secker & Warburg, (1954) W.L.R. 1138	30
Rosen v. United States, 161 U.S. 29	11
Roth v. Goldman, 172 F. 2d 788, 792	14
Stromberg v. California, 283 U.S. 359, 369	21
Swearingen v. United States, 161 U.S. 446, 451	11, 13
United States v. Alpers, 338 U.S. 680	11
United States v. Dennett, 39 F. 2d 564, 568-569	13
United States v. Dennis, 341 U.S. 494	23
United States v. Kennerly, 209 Fed. 119, 121	13, 15, 25
United States v. L. Cohen Grocery Co., 255 U.S. 81, 89	16
United States v. Levine, 83 F. 2d 156, 157	25
United States v. Limehouse, 285 U.S. 424	11
United States v. One Book Called Ulysses, 5 F. Supp. 182 (D.C. S.D.N.Y., 1933)	18
United States v. One Book Entitled "Ulysses" by James Joyce, 72 F. 2d 705, 707, 708	13
Winters v. New York, 333 U.S. 507, 519	11, 12, 21

Page

OTHER AUTHORITIES:

Alpert, Judicial Censorship of Obscene Literature 52 Harv. L. Rev. 40, 73 (1938) 16, 23
Chafee, Free Speech in the United States (1941) .. 24
Forster, Two Cheers for Democracy (1951) 26
Jahoda, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954) 16, 17
Jones, Life and Work of Sigmund Freud, Vol. 2, (1955) 27
Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295, 343-348 (1954) 18, 25
Obscene Publications Act, 20-21 Vict. c. 83 (1857) 24
Orwell, Homage to Catalonia (1950) 19
Orwell, Inside the Whale, in a Collection of Essays by George Orwell, (1954) 9
St. John-Stevas, The Law of Obscenity (1956) 22
Untermeyer, A Treasury of Ribaldry (1956) 31
Webster's New International Dictionary (2d ed., 1949) 14

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INTRODUCTORY STATEMENT

This brief is filed on behalf of two magazine publishers who use the mails in their businesses and who are involved in proceedings before the Post Office Department under § 1461 of Title 18, U.S.C.[1] Petitioner Roth was convicted under this provision. HMH Publishing Co., Inc. is engaged in publishing and distribut-

[1] In the Matter of HMH Publishing Company, Inc. for the Entry of "Playboy" Magazine as Second Class Mail Matter at Chicago, Ill., H.E. Docket No. 4/84; In the Matter of Petition by Greenleaf Publishing Co., Publishers of "Rogue for Men Magazine", for Order to Show Cause Why Application for Second Class Entry Should Not be Granted and for Hearing Before Denial of Application for Second Class Entry, H.E. Docket No. 4/202.

ing a monthly periodical entitled "Playboy." The magazine was first put on sale in December, 1953. The distribution of the March, 1957 issue exceeded 1,000,000 copies. Greenleaf Publishing Company publishes and distributes a monthly periodical entitled "Rogue for Men". The magazine was first put on sale in October, 1955 and its distribution in February, 1957 exceeded 300,000 copies. Both magazines rely upon the mails for a substantial part of their circulation.

Each of these magazines publishes articles on topics of current interest, short stories, and sketches, pictures and drawings of both a humorous and serious character. Some of the articles and stories are of conspicuous literary merit by widely known writers including Wolcott Gibbs, P. G. Wodehouse, Budd Schulberg, and Philip Wylie. All the stories and features are designed to be read with pleasure by the audience of adult male readers for whom the magazines are published. The emphasis in both magazines is upon articles, stories and drawings of a humorous nature.

The Post Office has sought to bar each magazine from second class mailing rights, which provide the only economically feasible method of distribution through the mails. Injunctions have been issued by the United States District Court for the District of Columbia restraining the enforcement of administrative orders issued by the Post Office designed to bar these magazines from access to the mails.[2] The pending proceedings, together with the omnipresent danger of future proceedings, raise serious and substantial

[2] *HMH Publishing Company, Inc. v. Summerfield*, C.A. No. 3041-55; *Greenleaf Publishing Co. v. Summerfield*, C.A. No. 3481-56.

problems for the publishers, who are exposed not only to a continual danger that the magazines will be suppressed, but also to the hazard that they, despite their serious efforts to publish magazines of acceptable taste and quality, will be convicted and imprisoned or fined by reason of their activities as publishers.

The practical, day-to-day problems which confront these publishers under this provision are not unique to them, however. The same issues must be faced by every writer, artist, photographer and publisher. Publishers of excellent reputation and serious purpose have been hailed into court and summoned before the Post Office under this provision. "Playboy" and "Rogue for Men" are not only the only targets of this type of legislation. World famous classics have been singled out for suppression under this or similar stat-

utes. The statute affects the small and the great; it is a gauntlet which must be run by literary masterpieces as well as by throw-away monthly magazines.

In appraising this extraordinary legislation, it is important to bear in mind that the protection of the young and the vulnerable is not a relevant consideration. The rule regulating the discussion of sex has undergone subtle growth over the past century, culminating in this Court's decision this term in *Butler* v. *Michigan*, —— U.S. ——. What may have begun in Victorian England and with Anthony Comstock as a concern with the corruption of the young and vulnerable—a corruption supposed to translate overtly into juvenile delinquency—became in time a restriction affecting the entire population. Then, in *Butler* v. *Michigan*, this Court held that however genuine or important the concern with the reading habits of the young, it is a concern which is irrelevant to the regulation of matter intended for distribution to adults. Although much is unclear in the law of obscenity today, it is now clear that its effects are to be tested by the reactions not of the young and the vulnerable but of the normal adult population. In short, unless the material is deleterious in its impact on adults, it cannot constitutionally be barred from general circulation because of possible consequences to children. We think it clear that Congress or the states may constitutionally enact appropriate legislation to shield children against obscene matter. A statute specifically designed to apply to children may be deemed valid although it would not satisfy the requirements of the First Amendment or the due process clause when applied to adults. *See Prince* v. *Massachusetts*, 321 U.S. 158, 168-169.

Moreover, it should be noted that the law here is concerned with the impact on an audience that is in no sense captive. Anyone who does not wish to consume obscene materials surely has a ready avenue of protection: he can simply leave them alone. "If one does not wish to associate with such folks as Joyce describes, that is one's own choice", said Woolsey, J., in *United States v. One Book Entitled "Ulysses"*, 5 F. Supp. 182. The focusing of the law on the thoughts, not actions, of adults, not children, who are free, not captive, is the framework within which the constitutionality of § 1461 must be tested.

The courts have rarely seen fit to isolate and make explicit the various levels of evils against which obscenity regulation is aimed. While it has been customary to string together the inciting to antisocial sexual conduct, the arousing of lustful thoughts, and the offending of the community sense of decency, any one of these standing alone has been regarded as a sufficient predicate for the regulation. The result is that in the present nebulous state of the law, the arousing of sexual thoughts alone, with no predication whatsoever of action, is enough. The law not infrequently deals with states of mind, but the law of obscenity is unique in its concern with states of mind which do not accompany overt action.

In the large it is not difficult for a writer, artist, photographer or publisher to stay clear of § 1461. All he has to do is avoid any explicit treatment of human love and sexual affairs. This, however, is an extravagant price. Love, lust and sex are pervasive human experiences. They cannot be dealt with adequately

without the possibility that they may result in sexually stimulating or sexually arousing some people. Literature cannot stay clear of or deny what everyone knows and experiences; social science cannot fail to report or study sexual mores; depth psychology cannot discard hypotheses as to sexual fantasy or the profound impact of sexual drives; and art cannot avoid portrayals of the human body.

Moreover, there is a large, imposing and growing body of opinion that sex and love are fundamental motivating drives, that their suppression or repression is destructive to mental health, and that free, open and candid treatment of sexual matters is conducive to happiness and a stable society.

We believe that § 1461, as presently construed and applied in the courts and administrative agencies, is unconstitutional. We believe that the statute is so vague and indefinite that it is impossible for a publisher to determine what he may safely publish and what he may not. It is a statute so lacking in specificity and so subjective in its application that it cannot be administered except in an arbitrary and capricious way. Because of the vagueness of the statute, authors, artists, photographers and publishers are inhibited from the free creation of ideas which the First Amendment is designed to safeguard. There is pressure to delete, to soften, to avoid. A statute which embodies a standard so vague invites the most vicious form of anti-intellectualism; it encourages anti-cultural movements, and triggers all of the suppressive impulses which lie latent in the community. A vague statute in the domain of the First Amendment encourages conformity and superficiality. It invites

the most prurient and intolerant to impose their harsh, rigid, and limited conceptions of morality, art and literature upon the entire community. The notion of obscenity as presently administered under this Act can stultify artistic creation and impoverish the community.

ARGUMENT

I. SECTION 1461 IS UNCONSTITUTIONALLY VAGUE

A. Judicial Interpretation of the Term "Obscene" Has Supplied No Workable Standard for Administration of Section 1461

We recognize that the validity of obscenity statutes frequently has been considered by lower courts. But while this Court has on several occasions referred in passing to such statutes,[3] it has reached no conclusion as to whether the term "obscenity" renders a criminal statute unconstitutional. In a few cases the court has upheld convictions where the validity of the statute was not challenged,[4] and in *United States* v. *Alpers*, 338 U.S. 680, the material in question was conceded to be obscene. The Court was equally divided in *Doubleday & Co.* v. *New York*, 335 U.S. 848. The constitutionality of obscenity statutes is therefore an open question before this Court, and one of vital concern today.

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[3] See *Ex Parte Jackson*, 96 U.S. 727; *Swearingen* v. *United States*, 161 U.S. 446; *Dysart* v. *United States*, 272 U.S. 655; *Near* v. *Minnesota*, 283 U.S. 697, 716; *United States* v. *Limehouse*, 285 U.S. 424; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572; *Winters* v. *New York*, 333 U.S. 507, 519; *Beauharnais* v. *Illinois*, 343 U.S. 250, 266; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505-506.

[4] *Grimm* v. *United States*, 156 U.S. 604; *Rosen* v. *United States*, 161 U.S. 29; *Price* v. *United States*, 165 U.S. 311; *Dunlop* v. *United States*, 165 U.S. 486; *Bartels* v. *United States*, 235 U.S. 427.

Section 1461 offers no guidance to the meaning of the word "obscene".[5] Unlike the terms "sacrilegious" and "massed crime stories of bloodshed and lust" which this Court found unconstitutionally vague,[6] the term "obscenity" comes to us with a judicial gloss written in almost a century of applications. But has this judicial gloss supplied a tolerable degree of meaning? It is an open secret that the answer is "no" and that in this instance the gloss has left the censors in our society free to establish an unhealthy surveillance over our arts and letters. It is a gloss under which Erskine Caldwell's "God's Little Acre" is obscene in Massachusetts,[7] but not in New York,[8] or Pennsylvania;[9] it is a gloss under which "Strange Fruit" is obscene[10] in some jurisdictions but not in others. It is a gloss under which it is held that a distinguished literary critic, Edmund Wilson, has at the height of his maturity written an obscene novel.[11] There are some legal terms like "fraud" which appear

[5] Section 1461 refers in the alternative to "obscene, lewd, lascivious or filthy" pictures or writings. As shown below, these terms are ordinarily used with little discrimination and the word "obscene" is employed to cover all of them. See the jury charge of the District Court below (Record, p. 25).

[6] *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495; *Winters* v. *New York*, 333 U.S. 507.

[7] *Attorney General* v. *Book Named God's Little Acre*, 326 Mass. 281, 93 N.E. 2d 819 (1950).

[8] *People* v. *Viking Press, Inc.*, 147 Misc. 813, 264 N.Y.S. 534 (City Mag. Ct. 1933).

[9] *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101 (1949).

[10] *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 62 N.E. 2d 840 (1945).

[11] *Doubleday & Co.* v. *New York*, 297 N.Y. 687, 77 N.E. 2d 6 (1947), affirmed without opinion, 335 U.S. 848.

intolerably vague only to the uninitiated; obscenity, we submit, is the opposite. The more we know of it, the less we know about it.

Three generations of judges have not been able to escape definitions of "obscene" which are totally circular. It is defined by reference to the lewd, the lascivious, the impure, the filthy. But the courts end up by defining each of these words in terms of the others.

Some sixty years ago this Court offered its only definition to date: "that form of immorality which has relation to sexual impurity". *Swearingen* v. *United States*, 161 U.S. 446, 451. Many definitions have been given by lower courts. We refer to only a few:

> "the present critical point in the compromise between candor and shame at which the community may have arrived here and now." L. Hand, J., in *United States* v. *Kennerley*, 209 Fed. 119, 121 (D.C. S.D.N.Y., 1913).
>
> "whether a publication taken as a whole has a libidinous effect." *United States* v. *One Book Entitled Ulysses by James Joyce*, 72 F. 2d 705, 707 (2d Cir., 1934).
>
> "whether it would tend to deprave the morals of those into whose hands the publication might fall by suggesting lewd thoughts and exciting sensual desires." *United States* v. *Dennett*, 39 F. 2d 564, 568 (2d Cir. 1930).
>
> "indecent, smutty, lewd or salacious reference to parts of the human or animal body or to their functions or to the excrement therefrom. * * *
>
> "Dirty word description of the sweet and sublime, especially of the mystery of sex and procreation, is the ultimate of obscenity." *Besig* v.

United States, 208 F. 2d 142, 145, 146 (9th Cir., 1953).

In sum, the term is so vague that it does not furnish a workable, rational standard for judicial administration. Settling on a single one of the many definitions of the word "obscene" would not solve this problem. For proof of this, we may examine the phrase "sexually impure thoughts" from the District Court's charge in this case. This definition was singled out by the court below and may be said to constitute the essence of the definition presently before this Court.

It will be noted at once that the arousing of mere sexual thoughts is not sufficient to constitute obscenity. Surely no sane man thinks socially dangerous the arousing of all sexual desires. See Judge Frank in *Roth v. Goldman*, 172 F. 2d 788, 792 (2d Cir. 1949), cert. denied 337 U.S. 938. Therefore, the key word in the definition is "impure".

"Impure" is not a term with special legal meaning. It is generally defined as unclean or adulterated, but, interestingly enough, one accepted definition is obscene.[12] Thus, we start with a definition which is tautological. What kind of inner thought or response does the law seek to prevent? Thoughts about sexual perversion? Extra-marital relationships? Changes in sex mores? If a man is shown a photograph of a bathing beauty, would it be impure for him to think (a) of kissing her; (b) of how she would look nude; (c) of intercourse with her, or (d) of marrying her? Does the thinker's own marital status or his moral standards affect the "purity" or "impurity" of such thoughts?

[12] Webster's New International Dictionary (2d ed., 1949).

The difficulties do not end here, assuming that the law's concern is with stimulus to the sexual thought of the average adult. How intense must the arousal of thought or desire be? Is the law to be read between the lines, as it were, saying that literal physical sexual excitement is the necessary response? And if this is what the law is aimed at, it does not save it as presently written, since this is not what the judge tells the jury.

Congress and the states may punish automobile stealing or embezzlement, but they may not do so by enacting statutes which simply prohibit "dishonest actions" without specifying what they are, any more than they may prohibit "vice" or make "virtue" mandatory. Likewise, subject to the First Amendment, Congress could punish, by clear and specific regulations, the mailing of pictures of wholly nude women, or articles giving detailed descriptions of sexual intercourse, if such things are found harmful to the nation. But can anyone be punished for violating the "present critical point in the compromise between candor and shame"[13] for using "dirty word[s]" to describe "the sweet and sublime",[14] for contravening the "intangible moral concepts" of "the present age",[15] or, as here, for stimulating "sexually impure thoughts"? No more, we submit, than people could be forced to obey "a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and

[13] *United States v. Kennerley*, 209 Fed. 119, 121 (D.C.S.D.N.Y. 1913).

[14] *Roth v. United States*, 205 F. 2d 142, 146 (9th Cir. 1953).

[15] *Palmelee v. United States*, 113 F. 2d 729, 731-732 (D.C. Cir. 1940).

jury." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89.

B. The Ambiguity of Section 1461 Is Underscored by the Absence of Any Evidence That Writings or Pictures Have Any Harmful Effects

As we have shown, the statute purports to prohibit the stimulation of certain thoughts. But even definition by the courts of the particular thoughts which it is a criminal offense to arouse would not eliminate the ambiguity for the simple reason that there is an utter lack of evidence concerning the impact which writings and pictures have on the human mind.

Specialists in human behavior know precious little about what influences the human mind. To date there has been only one study that has attempted a complete assessment of the effects of books and magazines on human thinking. Jahoda, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954). The author shows that the cause for later predispositions to sexual disturbances must be sought in early childhood, before there is any possibility of exposure to obscene literature (Jahoda, 19, 20); and that obscene literature has been found not an important stimulation or source of information to any group in the community (Jahoda, 26-27, 35-36).[16] She concludes that it is impossible to say with any accuracy what impact literature has on people's minds (Jahoda, 40).[17] Interestingly enough,

[16] Cf. the findings reported in Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40, 73 (1938) that women are stimulated primarily by the opposite sex, and hardly at all by literature.

[17] For a summary by Dr. Jahoda of her own conclusions, see Judge Frank's opinion below, 237 F. 2d at 815-816.

Dr. Jahoda suggests there is some basis for believing that reading, far from stimulating people to action, serves rather as a substitute gratification of needs that might otherwise lead to antisocial conduct (Jahoda, 37-40).

These findings were confirmed by the evidence in this case. Petitioner presented three expert witnesses. The first, Dr. Albert Ellis, a psychologist, therapist and marriage counselor (Transcript of Testimony, 315-318), testified with reference to the acceptance in present day America of material dealing with sex. He said that much of our popular literature contains explicit references to sex, as does a great deal of popular advertising. In his opinion the material sent through the mail by petitioner could not be considered obscene by present day standards (Tr. 360, 375). The second witness, Dr. Morris Herman, was a psychiatrist (Tr. 394). He testified that while books, like many other things might stimulate sexual thoughts, literature had no important effect on actions and does not contribute to sexual abnormalities or juvenile delinquency (Tr. 407, 409-410, 419-423, 430). These conclusions were supported by Dr. Irving Lorge, a distinguished psychologist (Tr. 448), who testified that the effect of a book depends on what people bring to it, rather than what they get out of it, and that there was no relationship between juvenile delinquency and reading material (Tr. 465, 457-468, 475).

These findings support the teachings of ordinary experience. We all know how hard it is to predict what will arouse thoughts of sex; that nakedness is not necessarily as exciting as a woman fully clothed; that over-clinical descriptions may be repellant rather than stimulating; and that an infinite variety of sounds,

smells, inanimate objects and activities may find some connection with sex through the devious passageways of the human mind.[18]

C. The Resort to Literary Criteria Generates Even Greater Confusion

The problem of determining whether a particular picture or writing is obscene under Section 1461 is all the greater because the courts have felt compelled to act as literary critics.[19] In *United States* v. *One Book Called Ulysses*, 5 F. Supp. 182 (D.C. S.D.N.Y., 1933), Judge Woolsey, in determining whether James Joyce's "Ulysses" was obscene, undertook an analysis of the work's literary merit. He found that it was not obscene because it was a "sincere and serious attempt to devise a new literary method for the observation and description of mankind". 5 F. Supp. at 185. This sincerity and artistic merit test was also applied by the Court of Appeals for the Second Circuit in affirming Judge Woolsey, 72 F. 2d 705. But the views of Judge Woolsey should be contrasted with the literary views of Judge Manton, who held, in a dissenting opinion, that "Ulysses" was obscene:

> ". . . The people need and deserve a moral standard; it should be a point of honor with men of letters to maintain it. Masterpieces have never been produced by men given to obscenity or lustful thoughts—men who have no Master. Reverence for good work is the foundation of literary character. A refusal to imitate obscenity or to load a book with it is an author's professional chastity." 72 F. 2d at 711.

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[18] See Judge Frank's opinion below, 237 F. 2d at 817.

[19] See discussion in Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295, 343-348 (1954).

As Judge Frank pointed out below, it is not clear whether the presence of artistic merit nullifies or renders innocent an otherwise obscene passage, or whether prima facie obscene materials can be privileged by their overall context. But in any event, it is now reasonably clear, at least under Federal law, that artistic merit affects the verdict.[20]

But do literary and artistic standards provide a surer basis for discriminating between the good and the bad? However, necessary, and however admirable this concession in the law, it serves to make the law less, rather than more, clear. If these matters are relevant, criminal guilt may then turn on purely aesthetic considerations. Consider two equally candid discussions of sex. One may escape unscathed, because it is thought to have the requisite artistic merit; publication of another may be a felony. Witness the treatment accorded Henry Miller's "Tropic of Cancer". One of the world's most distinguished critics, George Orwell, himself summed up as a "virtuous man" by Lionel Trilling,[21] highly prized Miller's book:

> "From a mere account of the subject matter of 'Tropic of Cancer' most people would assume it to be no more than a bit of naughty-naughty left over from the '20's. Actually, nearly everyone who read it saw at once that it was nothing of the kind, but a very remarkable book."[22]

[20] The Courts have read an exemption for literary merit into § 1461, although that statute conspicuously lacks the proviso inserted in the Customs Act, 19 U.S.C. § 1305(a) authorizing the Secretary of the Treasury to exempt the "so-called classics or books of recognized and established literary or scientific merit" from the ban on importation of obscene matter.

[21] Preface, "Homage to Catalonia" (1950).

[22] Orwell, "Inside the Whale" in A Collection of Essays by George Orwell, p. 217 (1954).

Nearly everyone, that is, except the judges who had occasion to pass on it. Contrast with Orwell's seasoned critical judgment, the outcry of the Ninth Circuit in *Besig* v. *United States*, 208 F. 2d 142, 145 (9th Cir., 1953):

> "Consistent with the general tenor of the books, even human excrement is dwelt upon in the dirtiest words available. The author conducts the reader through sex orgies and perversions of the sex organs, and always in the debased language of the bawdy house. Nothing has the grace of purity or goodness. These words of the language of smut, and the disgraceful scenes, are so heavily larded throughout the books that those portions which are deemed to be of literary merit do not lift the reader's mind clear of their sticky slime. And it is safe to say that the 'literary merit' of the books carries the reader deeper into it. For this reason, The Tropics are far more dangerous than 'Confessions of a Prostitute' which was the subject of our opinion in Burstein v. United States, 9 Cir., 1949, 178 F. 2d 665."

In the case of "Tropic of Cancer", therefore, although conceding "the great weight of opinion evidence as to the quality of Mr. Miller's writings", the Court employed literary merit, not to save the book but to condemn it totally. Indeed, many thoughtful observers would agree with the Ninth Circuit that a work of superior artistic merit should have a more profound impact than an inferior book or painting. Thus, a work may be condemned in the Second Circuit because it lacks sincerity and artistic merit, and condemned in the Ninth Circuit precisely because it possesses these attributes.

D. The Evil Consequences of a Vague Statute Are Greater in the Area Protected by the First Amendment

We need only add that the ordinarily evil effect of loosely drawn criminal statutes is all the greater where such statutes trench on the area protected by the First Amendment. This Court has held that the statutes so vague and indefinite as to restrain persons in the fair exercise of their right to freedom of expression are unconstitutional. *Stromberg* v. *California*, 283 U.S. 359, 369. In *Herndon* v. *Lowry*, 301 U.S. 242, 264, the Court again struck down a statute for this reason, saying:

> "No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment."

And this Court applied this very principle to the question of magazines concerned with bloodshed and lust in *Winters* v. *New York*, 333 U.S. 507.

In a very real sense, the existence of § 1461 in its present form acts as a deterrent to the exercise of freedom of expression. Publishers are deterred, not only by actual danger of criminal punishment, but also by threats of colorable prosecutions, fear of expensive litigation, and an unwillingness to run the risks of any vague and indefinite statute. We submit that the present statute is unconstitutional because it requires writers and artists, at the risk of severe criminal penalties, to make predictions and judgments in the fields of psychology and literary criticism which no person skilled in those professions would hazard. Prudence dictates that any thing questionable be suppressed, for

publishers are businessmen, not crusaders for constitutional principles. So long as the present statute remains in force, it will exercise a restraint on expression extending far beyond the area where Congress might legitimately act.[23] So long will the prurient and puritanical dictate the level of our arts and letters.

The burden of this legislation falls upon the community at large. Sex is a legitimate topic for free discussion in a mature society. Doubtless, there are some people who would prefer that there be no discussion of such emotions and that reticence be observed. But surely the emotional preferences of one segment of society cannot be fastened upon the entire community.

II. SECTION 1461 IS INVALID UNDER THE FIRST AMENDMENT

Section 1461 restricts the dissemination of literary and artistic ideas. It does so, as we have shown, in the most inclusive and vaguest of terms and without any evident relationship to an evil which Congress has

[23] A leading novelist and critic, E. M. Forster, has pointed out:

> "that even the writer whose record is hitherto unblemished is uncertain what may or may not be judged obscene and hesitates in fear and suspicion. What he is about to write may seem to him perfectly innocent; it may be essential to his book; yet he has to ask himself what will the police magistrate say; and not only what will the police magistrate say, but what will the printer say and what will the publisher say? For both printer and publisher will be trying uneasily and anxiously to anticipate the verdict of the police magistrate and will naturally bring pressure to bear upon the writer to put them beyond reach of the law. He will be asked to weaken, to soften, to omit. Such hesitation and suspense are fatal to freedom of mind and freedom of mind is essential to good literature." The Nineteenth Century and After, Vol. DCXXVI, April 1929, quoted by St. John-Stevas in *Obscenity and the Law*, p. 193 (1956).

power to prevent. The section is, therefore, in violation of the First Amendment.

Even if the statute were constitutionally definite it would still be invalid under the First Amendment for the reason that it invades the areas of thought and artistic creation which are insulated by the Amendment from any governmental regulation.

We do not know whether the Court believes that the test under Section 1461 is (i) the effect which so-called "obscene" matter supposedly has on the thoughts and emotions of an adult, non-captive audience, or (ii) whether the test is the effect on the conduct of such persons. If the former, we think the statute invalid for the reason that it seeks to control the area of thought sheltered by the First Amendment. If the test is whether the matter stimulates overt acts, specified and defined, the clear and present danger test should apply. Even if we postulate a statute which precisely defines the illegal acts, and assuming that the clear and present danger test is applicable, we think the statute would still be of doubtful constitutionality because of the utter impossibility of demonstrating any connection between the obscene matter and the prohibited conduct. In any event, as a minimum, the clear and present danger limitation or the "gravity" test delineated by the Court in *United States* v. *Dennis*, 341 U.S. 494, should be applied in obscenity cases.

First Amendment protection of ideas in this field cannot be denied on the ground that the obscene libel was an historic component of English common law in 1791, for two reasons. First, there was virtually no English law of obscenity at that time. Alpert, Judicial

Censorship of Obscene Literature, 52 Harv. L. Rev. 40 (1938); Lockhart & McClure, *op. cit. supra*; St. John-Stevas, The Law of Obscenity (1956). The first genuine obscenity decision in England was not rendered until 1868 and came only after the enactment of The Obscene Publications Act, 20-21 Vict. c. 83 (1857). *Queen* v. *Hicklin*, L.R. 3 Q.B. 360 (1868). Second, this Court has repudiated the notion that the First Amendment adopted the English law of free speech. See Justice Holmes dissenting in *Abrams* v. *United States*, 250 U.S. 616, 630; Chafee, Free Speech in the United States (1941) Ch. 1. There is therefore no apparent reason for holding that while the regulation of picketing, or contempt by publication, or incitement to violence, or even revolution must be measured against clear and present danger criteria, the regulation of literature candidly treating sexual topics need not be.

One final point. There is authority that the law of obscenity reaches one other category of evil—thematic obscenity. *People* v. *Friede*, 133 Misc. 611, 233 N.Y.S. 565, (City Mag. Ct., 1929); see *One, Inc.* v. *Olesen*, 25 LW 2415 (9th Cir. 1957). In the *Friede* case, the objection to Radclyffe Hall's "Well of Loneliness" went not to its sexual imagery or its taste, for the court found the book had artistic merit and restraint; it went only to the theme—a plea for the tolerant endurance by society of its homosexuals. Insofar as the law of obscenity reaches material on this premise, surely its reach is to be tested by customary First Amendment notions. For here we are quite literally involved in regulation of the market place of ideas.

Faced with the insuperable problems created by the First and Fifth Amendments, courts have sought refuge in the jury. In *United States* v. *Kennerley*, 209 Fed. 119 (D.C. S.D.N.Y., 1913), Judge Learned Hand first described the function of the jury in fixing the critical point in the "compromise between candor and shame". A quarter of a century later, Judge Hand had occasion to return once more to the role of the jury in obscenity cases in *United States* v. *Levine*, 83 F. 2d 156, 157 (2d Cir., 1936):

> "This earlier doctrine necessarily presupposed that the evil against which the statute is directed so much outweighs all interests of art, letters or science, that they must yield to the mere possibility that some prurient person may get a sensual gratification from reading or seeing what to most people is innocent and may be delightful or enlightening. No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently. As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury (Rosen v. U. S., supra, 161 U.S. 29, 42, 16 S. Ct. 434, 480, 40 L. Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community. There can never be constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors. We mentioned some of these in United States v. One Book Entitled Ulysses, supra, 72 F. (2d) 705; the work must be taken as a whole, its merits weighed against its defects (Konda v. U. S., [C.C.A. 7]

> 166 F. 91, 22 L.R.A. [N.S.] 304); if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premiss, but really a small bit of legislation ad hoc, like the standard of care."

In the end, the only meaning of obscenity is not a meaning the courts have been able to give it, but whatever meaning and whatever standard the jury sees fit to legislate each time it is given a case. However admirable the jury, as an institution for polling community sentiment on some troublesome issues, we do not believe that in this area a jury determination of community sentiments is consistent with the requirements of the First Amendment or the due process clause.

We do not think the jury can be delegated the power to punish authors, artists and publishers for an undefined offense. If Congress cannot legislate in this area because of constitutional limitations, surely the jury cannot do so. The use of the jury in these cases presents problems of a most fundamental nature. The jury is traditionally supposed to reflect the views of the average man. However, the function of literature and art is not merely to reflect community opinion, but rather to change public opinion, furnish leadership and provide insight into the unknown. The right to experiment is the lifeblood of art. See Forster, Two Cheers for Democracy, 97-98 (1951). We cannot entrust the determination of the permissible

bounds of free expression to a societal instrument which is designed to reflect the view of the average man. Freedom of expression means the right to express the unusual, the unconventional, the unacceptable and even the distasteful. When the works of Sigmund Freud were first published fifty years ago, they were deemed filthy and shocking by many people. See Jones, The Life and Work of Sigmund Freud, Vol. 2, ch. 4 (1955). No thoughtful person can doubt that the world would have sustained immeasurable loss if these works had been suppressed. Yet surely that would have been their fate if the average conscience of the community had been consulted. We submit that the dilemma created by the First and Fifth Amendments cannot be resolved by relegating these issues to the jury.

CONCLUSION

It is our position that Section 1461 is unconstitutional under both the First and Fifth Amendments as a vague and indefinite statute which invades the protected area of free expression.

We believe that the Section's repugnancy to the Constitution is all the more apparent when it is viewed as applied in this case. In the District Court, the prosecution offered no material evidence other than the matter alleged to be obscene. This was turned over to the jury with the following instructions by the trial court (R. 25-26):

> "The words 'obscene', 'lewd' and 'lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts. The matter must be calculated to corrupt and debauch the

minds and morals of those into whose hands it may fall. It must tend to stir sexual impulses and lead to sexually impure thoughts. The test is not whether it would arouse sexual desires or sexual impure thoughts [sic] in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and indecent way, that it tends to arouse a feeling of disgust and revulsion.

"The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards."

The court's charge that a "tend[ency] to stir sexual desire or sexually impure thoughts" and a "tend[ency] to arouse a feeling of disgust and revulsion" were sufficient for conviction violates the clear and present danger requirement of the First Amendment. The court's charge that a criminal offense was committed if feelings "of disgust and revulsion" were aroused by the publication offends the due process clause. It ignores the fact that this case involves a

non-captive, adult audience, free to read or to avoid the published materials.

These instructions, typical of those given in obscenity cases, emphasize the constitutional difficulties apparent on the face of the statute. They confuse many different definitions of obscenity, creating even greater uncertainty than the statute itself. They invite the jury to employ its own subjective standards in reaching a verdict; and to attempt to find, without any form of guidance, the average conscience of the community. They stress the need to protect the morals of the community but give no weight to the fundamental values to the community in freedom of expression.

If § 1461 is to be brought closer to the requirements of the Constitution, the issue to be determined must be carefully narrowed and subjected to exacting safeguards. At the very minimum, the Court should expose the supposed evil in this area to the same searching scrutiny under the First Amendment to which it subjects other federal and state legislation in the area of free speech. The power to decide that books shall not circulate cannot constitutionally be entrusted to the arbitrary whim of police officials, Post Office censors, administrative agencies, or even a judge.

If the question is to be committed to the jury, the jury must be made aware that the First Amendment recognizes the right freely to communicate ideas through speech and press, that our democratic society depends for its very survival upon the preservation of this freedom and that we will tolerate interference with this freedom only in rare cases where we conceive that its exercise will produce a greater evil than

its curtailment.[21] In such an atmosphere, the jury should then be instructed that they may convict only if persuaded beyond a reasonable doubt by a clear evidentiary showing that there is a clear and present danger that an illegal act will be induced by the material in question. As Judge Bok stated in *Commonwealth* v. *Gordon*, 66 Pa. D. & C. 101 (1949), aff'd. sub nom. *Commonwealth* v. *Feigenbaum*, 166 Pa. 120, 70 A. 2d 389 (1950); the prosecution must establish

> "that a crime or misdemeanor has been committed or is about to be committed, as the perceptible result of the publication and distribution of the writing in question . . ."

Whether or not § 1461, as so limited would be consistent with the First and Fifth Amendments, we believe it manifest that it cannot stand as applied here.

Section 1461 is not only unconstitutional, but as applied here it would stifle an enduring part of the human spirit. Louis Untermeyer observed recently that " . . . the world's favorite humor has been a playful expression of primitive sensuality", and that "The satisfactions of the body, from food to sex, are responsible for some of the wisest and wittiest as well as some of the most rollicking and ribald writing in literature." * * * [W]hile the world seems not only

[21] The charges of English courts in obscenity cases present a striking contrast to the charges in many cases in this country. See charge of Mr. Justice Stable in *R.* v. *Martin Secker & Warburg* (1954) W.L.R. 1138:

> "Your verdict will have a great bearing upon where the line is drawn between liberty and that freedom to read and think as the spirit moves us, on the one hand and on the other a license that is an affront to the society of which each of us is a member."

too much with him but against him, he [man] frequently thumbs his nose at it all and escapes by way of his irrepressible lust for life, his saving gift of gaiety, his very animal spirits." Untermeyer, A Treasury of Ribaldry, Foreword (1956).

For the reasons given, the judgment below should be reversed.

Respectfully submitted,

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